

¹ 5 U.S.C. § 8101 *et seq.*

\$425.00 every 28 days from appellant's continuing compensation payments; and (4) whether OWCP properly found that appellant abandoned her request for a prerecoument hearing.

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 19, 1993 appellant, then a 42-year-old computer programmer analyst, filed an occupational disease claim (Form CA-2), alleging job stress due to factors of her federal employment, including harassment and retaliation by her supervisor. She noted that she first became aware of her condition and its relationship to her federal employment in February 1992. Appellant stopped work on March 19, 1993 and resigned from the employing establishment in May 1993. OWCP accepted her claim for recurrent major depression and chronic post-traumatic stress disorder (PTSD). By letter dated November 6, 2000, it notified appellant that she would be paid wage-loss compensation benefits on the periodic rolls.

On February 18, 2019 appellant completed a Form EN1032 indicating that she received monthly SSA retirement benefits as part of an annuity for federal service.

On March 26, 2019 OWCP received from SSA a March 22, 2019 Federal Employees Retirement System (FERS)/(SSA) dual benefits calculation form which indicated that appellant had been in receipt of SSA age-related retirement benefits since February 1, 2017. The form showed SSA benefit rates with and without a FERS offset. Beginning February 1, 2017, appellant's SSA rate with FERS was \$864.90 and without FERS was \$287.60; beginning December 1, 2017, appellant's SSA rate with FERS was \$882.00 and without FERS was \$293.30; beginning December 1, 2018, appellant's SSA rate with FERS was \$906.50 and without FERS was \$301.50.

OWCP completed a FERS offset calculation form on April 17, 2019 and found a total overpayment of compensation in the amount of \$15,243.90. It indicated that for the period February 1 through November 30, 2017 appellant received an overpayment of compensation in the amount of \$5,766.63, for the period December 1, 2017 through November 30, 2018 in the amount of \$7,083.87, and for the period December 1, 2018 through March 30, 2019 in the amount of \$2,393.40, totaling \$15,243.90.

On April 23, 2019 OWCP advised appellant of its preliminary determination that she had received an overpayment of compensation in the amount of \$15,243.90 because she received wage-loss compensation from OWCP concurrently with SSA age-related retirement benefits without an appropriate offset. It included a FERS offset calculation sheet setting forth the basis of the overpayment. OWCP found that appellant was without fault in the creation of the overpayment and provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It informed her that, within 30 days of the date of the letter, she could request

² Docket No. 98-0268 (issued January 28, 2000).

a telephonic conference, a final decision based on the written evidence, or a prerecoupment hearing.

Appellant, on May 3, 2019, requested a prerecoupment telephonic hearing before an OWCP hearing representative. She contended that she had no knowledge of the overpayment and was without fault in its creation. Attached to appellant's request was a completed Form OWCP-20 where she listed a total monthly income of \$4,631.00, including FECA compensation benefits of \$3,100.00, SSA benefits of \$771.00, and Supplemental Security Income payment of \$760.00. Her monthly expenses included \$1,563.50 for rent or mortgage, \$880.00 for food, \$100.00 for clothing, \$880.00 for utilities, and \$700.00 in miscellaneous expenses, totaling \$4,123.50. No supporting financial documentation accompanied her completed Form OWCP-20.

In a July 25, 2019 letter, OWCP advised appellant that a telephonic prerecoupment hearing was scheduled for September 10, 2019 at 12:15 p.m. Eastern Standard Time (EST). The hearing notice included a toll-free number and pass code to enable access to the telephonic hearing. The hearing notice was mailed to appellant's last known address. Appellant did not appear for the prerecoupment hearing.

By decision dated September 26, 2019, an OWCP hearing representative found that appellant had abandoned her oral prerecoupment hearing scheduled for September 10, 2019. The hearing representative found that there was no indication of record that appellant contacted the Branch of Hearings and Review either prior to or subsequent to the scheduled hearing to explain her failure to appear. OWCP's hearing representative further finalized the preliminary determination that appellant had received an overpayment of compensation in the amount of \$15,243.90 for the period February 1, 2017 through March 30, 2019, for which she was not at fault, as she had received FECA wage-loss compensation benefits without an appropriate offset for SSA age-related retirement benefits attributable to FERS. OWCP's hearing representative denied waiver of recovery of the overpayment, finding that her monthly income exceeded her monthly expenses by approximately \$500.00. The hearing representative required recovery of the overpayment by deducting \$425.00 every 28 days from appellant's continuing compensation payments until the debt was paid in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her federal employment.³ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁴ When an overpayment has been made to an

³ *Supra* note 1 at § 8102(a).

⁴ *Id.* at § 8116.

individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.⁵

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to federal service of the employee.⁶ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$15,243.90, as she received SSA age-related retirement benefits while concurrently receiving FECA wage-loss compensation benefits for the period February 1, 2017 through March 30, 2019, without appropriate offset.

In its September 26, 2019 decision, an OWCP hearing representative found that an overpayment of compensation was created for the period February 1, 2017 through March 30, 2019. The overpayment was based on the evidence received from SSA with respect to age-related retirement benefits paid to appellant. A claimant cannot receive both FECA compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.⁸ The information provided by SSA indicated that appellant received SSA age-related retirement benefits that were attributable to federal service during the period February 1, 2017 through March 30, 2019. OWCP therefore properly determined fact of overpayment.

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were attributable to federal service must be calculated. OWCP received a FERS offset calculation form provided by SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. The SSA provided their rate with and without FERS for the period February 1, 2017 through March 30, 2019. OWCP provided its calculations for the relevant period based on a FERS offset calculation worksheet and in its April 23, 2019 preliminary overpayment determination. No contrary evidence was received.

⁵ *Id.* at § 8129(a).

⁶ 20 C.F.R. § 10.421(d); *see R.R.*, Docket No. 19-0104 (issued March 9, 2020); *T.B.*, Docket No. 18-1449 (issued March 19, 2019); *L.J.*, 59 ECAB 264 (2007).

⁷ FECA Bulletin No. 97-09 (February 3, 1997).

⁸ *Supra* note 1 at § 8116(d)(2); *see C.M.*, Docket No. 19-1451 (issued March 4, 2020); *L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.T.*, Docket No. 18-1791 (issued May 17, 2019).

The Board has reviewed OWCP's calculation of benefits received by appellant for the period February 1, 2017 through March 30, 2019 and finds that an overpayment of compensation in the amount of \$15,243.90 was created.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."⁹

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.¹⁰ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹¹ Also, assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent.¹² An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.¹³

Recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on such payment or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁴

OWCP regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to

⁹ *Supra* note 1 at 8129(b).

¹⁰ *Supra* note 6 at § 10.436(a), (b). For an individual with no eligible dependents the asset base is \$6,200.00. The base increases to \$10,300.00 for an individual with a spouse or one dependent, plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4(a)(2) (September 2018).

¹¹ *Id.* at Chapter 6.400.4(a)(3); *N.J.*, Docket No. 19-1170 (issued January 10, 2020); *M.A.*, Docket No. 18-1666 (issued April 26, 2019).

¹² *Id.* at Chapter 6.400.4(a)(2) (September 2018).

¹³ *Id.* at Chapter 6.400.4(b)(3).

¹⁴ *Supra* note 6 at § 10.437(a), (b).

determine the repayment schedule, if necessary.¹⁵ Failure to submit the requested information within 30 days of the request shall result in denial of waiver.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁷

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because she has not shown both that she needs substantially all of her current income to meet ordinary and necessary living expenses. As her monthly income of \$4,631.00 exceeds her monthly ordinary and necessary expenses of \$4,123.50 by more than \$50.00, she has not shown that she needs substantially all of her current income to meet current ordinary and necessary living expenses.¹⁸ Because she has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the second prong of the test.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because she has not shown, for the reasons noted above, that she would experience severe financial hardship in attempting to repay the debt or that she relinquished a valuable right or changed her position for the worse in reliance on the payment which created the overpayment.¹⁹

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, she has failed to establish that OWCP acted improperly by denying waiver of recovery of the \$15,243.90 overpayment.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provides that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account

¹⁵ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

¹⁶ 20 C.F.R. § 10.438; *see D.M.*, Docket No. 19-1369 (issued June 30, 2020).

¹⁷ *Supra* note 6 at § 10.436.

¹⁸ *Supra* note 14.

¹⁹ *Supra* note 6 at § 10.437.

the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.²⁰

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$425.00 every 28 days from appellant's continuing compensation payments.

OWCP found that appellant had total monthly income of \$4,631.00 and monthly expenses of \$4,123.50. It found that her monthly income exceeded her expenses by approximately \$500.00, which could be applied for debt repayment each month. The hearing representative gave due regard to the relevant factors noted above and did not abuse its discretion in setting the rate of recovery.²¹ The Board thus finds that it properly required recovery of the overpayment by deducting \$425.00 from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 4

A claimant dissatisfied with a decision on his or her claim is entitled, upon timely request, to a hearing before an OWCP representative.²² Unless otherwise directed in writing by the claimant, the hearing representative will mail a notice of the time, place, and method of the oral hearing to the claimant and to any representative at least 30 days before the scheduled hearing date.²³

A hearing before OWCP's Branch of Hearings and Review can be considered abandoned only under very limited circumstances.²⁴ With respect to abandonment of hearing requests, Chapter 2.1601(g) of OWCP's procedures²⁵ and section 10.622(f) of its regulations²⁶ provide in relevant part that failure of the claimant to appear at the scheduled hearing, failure to request a postponement, and failure to request in writing within 10 days after the date set for the hearing that another hearing be scheduled shall constitute abandonment of the request for a hearing. Under these circumstances, the Branch of Hearings and Review will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the district office.²⁷

²⁰ *Id.* at § 10.441(a); *see C.M., supra* note 8.

²¹ *L.M.*, Docket No. 19-1197 (issued January 8, 2020); *T.G.*, Docket No. 17-1989 (issued June 6, 2018).

²² *Supra* note 1 at § 8124(b).

²³ *Supra* note 6 at § 10.617(b).

²⁴ *C.Y.*, Docket No. 18-0263 (issued September 14, 2018); *Claudia J. Whitten*, 52 ECAB 483 (2001).

²⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (October 2011).

²⁶ *Supra* note 6 at § 10.622(f).

²⁷ *Id.*

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly determined that appellant abandoned her request for a prerecoupment hearing.

OWCP's Branch of Hearings and Review received appellant's May 3, 2019 request for a telephonic prerecoupment hearing. In a July 25, 2019 letter, OWCP provided appellant 30 days written notice of the hearing, which was scheduled for September 10, 2019 at 12:15 p.m. EST. It mailed the July 25, 2019 notice of hearing to appellant's last known address, and it was not returned as undeliverable. Absent evidence to the contrary, a notice mailed in the ordinary course of business is presumed to have been received by the intended recipient.²⁸ The presumption is commonly referred to as the "mailbox rule."²⁹ It arises when the record reflects that the notice was properly addressed and duly mailed.³⁰ The current record is devoid of evidence to rebut the presumption that appellant received OWCP's July 25, 2019 notice of hearing.

The hearing notice was properly addressed to appellant's last known address.³¹ Appellant did not call-in as instructed for the September 10, 2019 scheduled telephonic hearing and there is no indication that she requested postponement of the telephonic hearing.³² Moreover, she did not submit a written request within the 10 days after the date set for the telephonic hearing and request that another telephonic hearing be scheduled. Under the circumstances, OWCP's hearing representative properly found that appellant abandoned her telephonic hearing request.³³

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$15,243.90, for which she was not at fault, as she concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation benefits for the period February 1, 2017 through March 30, 2019, without proper offset. The Board also finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$425.00 every 28 days from appellant's continuing compensation payments. The Board further finds that OWCP properly determined that appellant abandoned her request for a telephonic prerecoupment hearing before an OWCP hearing representative.

²⁸ *C.Y.*, *supra* note 24; *Kenneth E. Harris*, 54 ECAB 502 (2003).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*; *K.F.*, Docket No. 17-1035 (issued August 24, 2017).

³² 20 C.F.R. § 10.622(c).

³³ *C.Y.*, *supra* note 24; *M.V.*, Docket No. 17-1795 (issued March 1, 2018).

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board